

Submission to the Australian Law Reform Commission

Review of the Family Law System Discussion Paper No 86 (2018)

Date: Tuesday 13 November 2018



INTRODUCTION

The Law Institute of Victoria ('LIV') is Victoria's peak body for lawyers and represents more than 19,500 people working and studying in the legal sector in Victoria, interstate and overseas. The fundamental purpose of the LIV is to foster the rule of law and to promote improvements and developments in the law as it affects the public of Victoria. Accordingly, the LIV has a long history of contributing to, shaping and developing effective state and federal legislation, and has undertaken extensive advocacy and education of the public and of lawyers on various law reform and policy issues.

As a constituent body of the Law Council of Australia ('LCA'), the LIV supports the LCA submission on the Australian Law Reform Commission's *Review of the Family Law System*. The LCA submission represents a multitude of constituent bodies throughout Australia, and provides a comprehensive analysis of the national issues. The LIV submission is based on the unique experience of Victoria and has been prepared by representatives of the LIV's Family Law Section, which is comprised of over 2,500 members working and studying in the legal sector in Victoria.

The LIV welcomes the opportunity to comment on the LCA response to the Australian Law Reform Commission (ALRC) – *Review of the Family Law System* Discussion Paper No 86 (2018) ('DP86'). The LIV welcomes any further opportunity to provide feedback and be consulted on any proposed changes to the family law system.

Please contact FamilyLawSection@liv.asn.au if you have any queries in relation to this submission.

EXECUTIVE SUMMARY

The LIV commends the objectives of the proposals, including the objective to further prioritise the best interests of children and to provide appropriate, early and cost-effective resolution of family law disputes.

The LIV further notes that the ALRC advocates for a 'client-centred approach' to any reforms of the family law system, that focuses on meeting the needs of families and individuals within the system. The LIV fully supports reforms that will improve efficiency and accessibility of the family law jurisdiction in the federal court system, and stresses that improving outcomes for children and families should form the paramount consideration of any reform process.

In addition to the LCA submission, the LIV notes that its members have expressed specific concerns in response to the direct proposals and questions contained in DP86 as stated below and using the numbering provided in the paper:

- **Proposals 3-1 to 3-6 “Simpler and clearer Legislation”**

The LIV supports the simplification of language through redrafting the *Family Law Act 1958* ('FLA').

However, the LIV is concerned unnecessary changes to legal terms of art with distinct legal meanings may cause further confusion, particularly if they are widely used in other areas of law, for example 'subpoena'.

Idiosyncratic amendments to language may lead to further confusion with third party stakeholders, for example, Victoria Police or Primary Schools, who often know and use the same terminology consistently.

The LIV further notes the proposed inclusion of the term 'safety' in the paramountcy principle prioritising consideration of a child's best interests as enshrined in the FLA. Whilst elevating focus on the child's welfare and best interests is undoubtedly non-controversial and supported by the LIV, it is difficult to understand how an order could be made that is stated to be in a child's best interests that also compromised that child's safety.

The LIV considers amendments of this nature may add further complexity or redundancy to the legislation, thereby contradicting the purpose of redrafting the FLA.

In short, caution should be exercised in relation to any redrafting of the FLA to not produce unintended consequences.

- **Proposals 3-10 to 3-17 “Simpler and clearer Legislation” (cont...)**

The LIV considers that where the ALRC requires further research to implement proposals in property and financial matters, for example proposal 3-12, such research must take into consideration the economic wellbeing of families after separation including a consideration of child support, which was not specifically mentioned in DP86 but which has considerable impact on the welfare and ability of families to recover following separation leading to ramifications not only upon the ability of the parents to financially support a child, but also upon the creation of two separate households and the financial stresses and considerations flowing from such a division.

The LIV is concerned that the ALRC proposals as outlined in DP86 have significant funding and operational hurdles/impediments to overcome, before those proposals can be efficiently delivered, to ensure the overall aim of instilling public confidence in the family law system is met.

Proposal 3-10

The LIV supports the concept that there should be amendments to the provisions for property division in the FLA to more clearly articulate the process for the Courts when dealing with applications for a division of property.

However, the LIV notes that the actual process of simplification can have inadvertent consequences and the implementation of amendments to an area that has received considerable authoritative judicial attention should be conducted with due care and attention to detail.

The LIV encourages consideration of the inclusion of further matters, such as, the promotion of the child’s best interest, safety and wellbeing, and taking into consideration the child’s housing requirements during separation, as relevant factors under section 75(2) and to the process of property division generally.

Overall, however, the LIV has some concerns that these changes would involve a radical departure from the existing family law system. Further, such matters are to already relevant factors able to be argued within subsection 75(2) of the FLA.

Proposal 3-11

The LIV supports specific reference to the *Kennon* principles, however notes that codification may not be necessary, given the principles are already commonly known and practiced in family law matters.

The LIV however suggests that the principles enunciated in *Stanford* ought be considered for codification to provide clarification as to the threshold determination of when courts will or will not take parties' contributions into account.

The LIV also supports legislative guidance or codification of controversial legal principles, such as 'add-backs', should be applied however again notes the risks inherent in directive statements that could potentially lead to further litigation testing redrafted legislation.

Significant jurisprudential commentary exists regarding redrafting provisions of the FLA, which concludes that amending provisions of the FLA would not in fact assist the public, if the result of those amendments and/or simplification, results in less judicial commentary on FLA provisions and how they are apply and/or interpreted in contested hearings.

Proposal 3-12

The LIV supports the proposal but notes funding may be an issue.

Proposals 3-13 to 3-14

The LIV supports the proposals but notes that there is a lack of clarity surrounding their purpose.

The LIV respectfully submits that should an evaluation of such an inquiry result in industry action which does not adequately assist vulnerable parties, the Australian Government should consider relaxing the requirement that it must not be foreseeable, at the time that an order is made, that making the order would result in a debt not being paid in full.

Proposal 3-18 to 3-19

In principle, the LIV supports the greater use of Registrars to manage and resolve urgent applications and administrative assessments of spousal maintenance applications where possible.

The LIV notes that the issue of the location of dedicated spousal maintenance considerations in the FLA is largely immaterial.

Additionally, the LIV supports the inclusion of family violence as a relevant consideration in spousal maintenance applications, especially when assessing the ability of the applicant to adequately support themselves, which would particularly be taken into weighty consideration of interim applications.

The LIV shares the LCA's concerns regarding the significant resourcing required to implement the proposals.

The LIV respectfully submits that additional administrative powers should be granted to Family Court Registrars in urgent matters. The LIV recommends the granting of these additional powers to allow administrative assessment, analogous to those of the Child Support Unit of the Department of Health and Human Services. Additionally, it would be useful to allow information to be shared across state and federal jurisdictions, for example by allowing the registration of spousal maintenance orders in a manner comparable to that of child maintenance orders.

Question 3-3

The LIV notes that the issue of binding financial agreements is only dealt with briefly by the ALRC.

The LIV does not support a substantial change in the legal position of binding financial agreements.

The LIV commends the LCA's further considerations in relation to the now lapsed *Family Law Amendment (Financial Agreements and Other Measures) Bill 2015*.

Generally

The LIV considers that these proposals require further research on the range of outcomes for all parties involved, especially in respect to spousal maintenance and financial matters, which affect the economic wellbeing of families after separation. Consequently, the LIV recommends the proposed FLA amendments should be deferred until empirical research is complete and it is deemed appropriate to redraft such a significant and substantial piece of legislation.'

- **Proposals 5-2 to 5-11 "Dispute Resolution"**

The LIV is concerned the introduction of compulsory FDR in financial matters, even with certain exceptions, may lead to vulnerable parties being adversely impacted by agreeing to settle in the absence of understanding their entitlements and without being assisted by lawyer-led negotiations.

The LIV wishes to express its members' concern that if compulsory FDR procedures are introduced, matters may settle due to subtle forms of family violence which are inherent in relationships of unequal bargaining power, potentially leading to unjust outcomes. Most families experience and have elements of unequal bargaining power, hence the need for parties to be given the opportunity to obtain and retain independent legal advice prior to the occurrence of any form of financial mediation.

Given the finality of property orders, it is essential that parties do not enter a process that does not include; a rigorous exploration of the relevant legal and financial issues, an exchange of financial information and documentation and independent legal advice throughout the process.

LIV has previously supported the greater use of legally assisted FDR to facilitate earlier resolution of disputes. However, there are questions regarding the proposals' implementation and resourcing, for example:

- How would non-compliance and enforceability of FDR outcomes be implemented or assessed in litigious proceedings?
- Would FDR practitioners require formal accreditation to deal with financial matters?

The LIV endorses a “genuine effort to resolve the matter in good faith” requirement in financial matters. However, the LIV queries how this would fit into pre-action court procedures, or form part of the application process, which would require further investigation into the implementation of proposal 5-4.

The LIV submits that Rule 1.05 of Schedule 1 of the *Family Law Rules* already contains mandatory pre-action procedures. These procedures should either be more readily enforceable by the judiciary, or alternatively a genuine steps pre-action procedure be developed in conjunction with the existing legislative framework, although the LIV notes that there is currently no Federal Circuit Court equivalent.

In the alternative, the LIV suggests the requirements of the *Civil Procedure Act 2010* (Cth), should be superimposed into a new “genuine attempt” procedure in conjunction with the *Family Law Act 1975* (Cth).

The LIV supports disclosure obligations on family law solicitors in proposed 5-7, however cautions against the consequences of non-disclosure as proposed in 5-2. The LIV particularly regards potential criminal penalties as being wholly inappropriate.

The LIV considers the proposal outlined in 5-8 merely duplicates current Family Law Rules that simply need to be enforced, and notes that advisers are already under a general duty of full, frank and continuing disclosure, in family law matters.

The LIV echoes the concerns of the LCA regarding the expansion of FDR practices, which it considers would require substantial resourcing, the details of which have not yet been provided by the Victorian or Federal Governments.

- **Proposal 6-1 to 6-7 “Reshaping the Adjudication Landscape”**

The LIV is concerned that further research and analysis is required in order to determine what legislative guidance may be required to efficiently operate a small claims list.

Comparative case analysis is required to determine;

- how a ‘simplified small property claims process’ applies;
- in what circumstances; and
- the definition of a ‘small asset pool’?

The LIV considers that any process would still need to satisfy the legislative requirement of coming to a just and equitable outcome. A lack of appreciation in the complexities involving small asset pools and short-term relationships, raises concerns regarding the requirement and disproportionate intricacies of professional skills, expertise and experience of family law professionals dealing with such cases. Should these matters not be dealt by family law professionals, court officials, legal advisers, mediators and others, who hold the relevant expertise, such matters will inevitably create issues elsewhere in the family law system, for example, family violence issues, future appeals and litigation on non-property relates issues.

The LIV respectfully submits that analogous FDR exceptions could apply to exclude matters which involve family violence, urgent matters, and matters where there was a weaker party, for example a self-represented litigant.

The LIV welcomes future consultation on these matters.

The LIV strongly opposes the creation of a specific family violence list given the complexities and complications as outlined in the LCA's response.

- **Proposals 10-1 to 10-10 “A Skilled and Supported Workforce”**

The LIV unreservedly supports the LCA's comments outlined in the LCA's draft response.

- **Proposals 12-1 to 12-10 “System Oversight and Reform Evaluation”**

The LIV strongly opposes the creation of a Family Law Commission to oversee the implementation of a workforce capability plan.

The LIV notes that the family law system already has an efficiently managed and operational accreditation scheme, regulated by the relevant law societies. The current scheme not only sets the requisite standards, but also provides training to family law practitioners. The current accreditation scheme also oversees and manages the complaint handling process. Compulsory Professional Development schemes are managed and enforced by the LIV and its specialist accreditation section requiring ongoing and relevant legal and ethical training to be undertaken and maintained by legal practitioners.

The LIV considers:

- (a) the creation of a Family Law Commission would duplicate existing functions and responsibilities of the respective law societies. For example, the LIV already addresses the consideration of professional competencies outlined in proposal 10-3;
- (b) the proposed Family Law Commission would be created at great cost, and the LIV's Advisory Committee and Specialisation Board efficiently address core competencies of family law professionals;
- (c) education programs for the community at large can be achieved by government resourcing and funding of such services, such as legal aid community legal education and court assisted programs; and
- (d) proposed research and reforms can be conducted by current family law institutions, such as the Australian Institute of Family Studies.

Should the Australian Government propose to enforce a detailed and mandated accreditation scheme for family law professionals, the LIV expects that solicitors who would not normally practice in family law, would strongly oppose proposals in relation to a scheme, which may be considered a restraint of trade. These proposals would dramatically affect the rights of practitioners who choose to practice in family law but do not choose to attain formal accreditation.

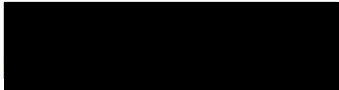
The LIV respectfully submits that should a mandatory accreditation requirement be imposed by the Australian Government, any future scheme should be administered by law societies. This would enable the continuation of the existing efficient, professional and cost effective regulation of accreditation.

The LIV confirms its endorsement of the LCA's submission including those points raised in relation to potential funding and implementation of the proposals contained in DP86.

Further consultation and contact

Please contact Paul Snow, Senior Policy Lawyer for the LIV Family Law Section on (03) 9607 9314 or at psnow@liv.asn.au, should you have any further queries or wish to discuss any of the matters raised in this submission.

Yours sincerely



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